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June 7, 2006

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45; In the Matter of IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

On June 6, 2006, Kathleen Grillo and Ed Shakin of Verizon and Anne Hoskins of Verizon Wireless held separate meetings with Scott Bergmann, Legal Advisor to Commissioner Jonathan Adelstein, and Ian Dillner, Legal Advisor to Commissioner Deborah Tate, and on June 7, 2006 also met with Michelle Carey, Legal Advisor to Chairman Kevin Martin, to discuss the above-referenced proceedings. Verizon discussed its attached white paper, and reiterated its view that pending implementation of the new contribution mechanism – which may take at least 12 months from its adoption – the Commission may and should take interim steps to assure the short-term sustainability of the fund. Verizon also stated that the Commission could require VoIP providers to contribute to the fund based on a safe harbor or proxy percentage of revenues on an interim basis.

In addition, Verizon Wireless provided information about the traffic-based study it uses to estimate its interstate revenue percentage for federal universal service filings. Verizon Wireless explained that it had filed this methodology in the Universal Service docket in 2002 and commented upon this method in the Commission's December 2002 Second Further Notice of Proposed Rulemaking. Verizon Wireless argued that the Commission should continue to allow carriers to file actual revenues based upon traffic studies that capture the originating and terminating points of wireless calls. Verizon Wireless also discussed the estimate of its 2004 interstate revenue percentage filed by Tracfone in 2005. Verizon Wireless explained that the Tracfone estimate significantly overstates the proportion of Verizon Wireless traffic that is

interstate and that if the Commission decides to make any changes to its USF policies for wireless carriers, it should not do so based upon the TNS study.

Pursuant to Section 1.1206(b) of the Commission's rules, one electronic copy of this notice is being filed in the above-referenced proceeding.

Sincerely,

Kathleen Grillo

Attachment

cc: Michelle Carey
Scott Bergmann
Ian Dillner

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Vice President
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May 23, 2006

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45; In the Matter of IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

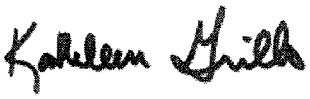
Assuring sustainable, sufficient, affordable, and competitively neutral funding of universal service is one of the most pressing issues before the Commission. The current funding mechanism, which assesses interstate and international end user telecommunications service revenues, is becoming decreasingly viable. Sharp declines in long distance revenues, coupled with the proliferation of bundled services and IP-based alternatives to traditional long distance, have led to a shrinking funding base. Moreover, the current funding mechanism fails to comport with the statutory requirement that contributions be "equitable and non-discriminatory," 47 U.S.C. § 254(d), because interconnected VoIP providers – which compete directly against traditional telecommunications carriers – generally do not contribute. At the same time, the size of the universal service fund is growing rapidly, fueled by additional demands from competitive eligible telecommunications carriers, inflationary elements built into rural high cost support mechanisms, and the provision of hundreds of millions of dollars in funding even in areas where competition obviates the need for federal universal service support.

The most important step the Commission can take to assure sustainable universal service support is to rein in growth of the fund. It is also critical, however, to move promptly to a more stable, equitable, and competitively neutral funding mechanism. In particular, the Commission should adopt a number-based contribution mechanism that combines per-number assessments with continued revenue-based assessments for significant categories of services that do not rely on numbers, such as pre-paid calling cards and end user special access services. Such a mechanism would rest on a more sustainable long-term funding base than the current approach.

Moreover, a number-based mechanism would be equitable and competitively neutral, since it would assess all potentially substitutable services (including VoIP) in like fashion.

Pending implementation of the new contribution mechanism – which may take at least 12 months from its adoption, as several parties have explained – the Commission may wish to take interim steps to assure the short-term sustainability of the fund. The attached white paper explains that the Commission would have the legal authority to require interconnected VoIP providers to contribute based on a safe harbor or proxy percentage of revenues on an interim basis without resolving the regulatory classification of the service.

Sincerely,



Attachment

cc: Dan Gonzalez
Michelle Carey
Jessica Rosenworcel
Scott Deutchman
Scott Bergmann
Dana Shaffer
Tom Navin
Thomas Buckley
Jeremy Marcus

The FCC Has Authority To Require Interconnected VoIP Providers To Contribute To the Federal Universal Service Fund Without Resolving the Regulatory Classification of VoIP and May Establish an Interim VoIP "Safe Harbor" or "Proxy" Pending Reform of the Contribution Mechanism

The Commission has authority to compel interconnected VoIP providers to contribute to the Federal Universal Service Fund without having to resolve the regulatory classification of VoIP.[1] Moreover, pending comprehensive reform of the contribution mechanism, it may require interconnected VoIP providers to contribute pursuant to a safe harbor or proxy approach that calculates contributions based on a certain percentage of VoIP retail revenues.

1. The FCC Has Authority To Require USF Contributions from Interconnected VoIP Providers.

The Commission need not resolve the question of whether interconnected VoIP qualifies as a "telecommunications service" or an "information service" in order to require VoIP providers to contribute to the Federal Universal Service Fund.

On the one hand, if interconnected VoIP is considered a telecommunications service, then an interconnected VoIP provider is a "telecommunications carrier," *see* 47 U.S.C. § 153(44), and thus must contribute to the Federal Universal Service Fund. *Id.* § 254(d) ("*Every* telecommunications carrier that provides interstate telecommunications services *shall* contribute ....").

On the other hand, if interconnected VoIP providers are considered "information service" providers, the Commission can exercise its discretionary authority under Section 254(d) to compel them to contribute. That section empowers the Commission to require contributions

[1] "Interconnected" VoIP providers enable their customers generally to send calls to and receive calls from the public switched telephone network. *See IP-Enabled Services, E-911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶ 1 n.1 (2005).

from "other provider[s] of interstate telecommunications ... if the public interest so requires." Because VoIP necessarily includes "telecommunications," whether or not it is classified as an information service, Section 254(d) authorizes the Commission to extend such an obligation to VoIP if it is in the public interest to do so.

a. The VoIP services provided by interconnected VoIP providers necessarily include "interstate telecommunications." When a VoIP customer makes a call to, or receives a call from, the PSTN, the VoIP provider provides a service that includes "telecommunications." And that is true regardless of whether interconnected VoIP is classified as an information service. That is so because information services, by definition, are provided "via telecommunications." 47 U.S.C. § 153(20). Accordingly, an interconnected VoIP provider by definition provides telecommunications as part of its service.

Notably, interconnected VoIP services necessarily include telecommunications regardless of whether the provider uses its own transmission facilities (as in the case of cable VoIP providers) or transports the communication through resale of another carrier's facilities (as in the case of "over the top" VoIP providers).[2] Indeed, judicial and Commission precedent makes clear that a service provider "provides" telecommunications even if it does not own the underlying

[2] The language in the Commission's 1998 Report to Congress cannot be contrary to this conclusion, since the Report did not directly address the issue here -- the scope of the last clause of section 254(d). *Universal Service Report to Congress*, 13 FCC Rcd 11501 (1998). Instead, where it discussed "telecommunications," it did so in the context of whether "telecommunications service" and "information service" are mutually exclusive categories (see *id.* at ¶ 39 and following), and, in particular, in the context of analyzing the statutory definition of "telecommunications service" (see *id.* at ¶ 40 and following). That discussion did not address whether VoIP providers may be subject to universal service contribution obligations under the permissive last clause of section 254(d). Indeed, the Report expressly "defer[red]" a resolution even of whether VoIP providers going forward would be subject to "section 254(d)'s *mandatory* requirement to contribute to universal service mechanisms" (*id.* at ¶ 90-92 (emphasis added)), and declined "to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings" (*id.* at ¶ 90). And where the Report did discuss the Commission's *permissive* contribution authority, it did not address the issue of whether that permissive authority applied in the case of VoIP services (*id.* at ¶¶ 116,131-139).

transmission facilities. *See, e.g., U S West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir 1999) (a company "provides a service even when it is only marketing the services of another"); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 ¶ 115 (1996) ("A BOC provides an interLATA information service when it *provides* the interLATA telecommunications transmission component of the service either over its own facilities, *or by reselling the interLATA telecommunications service of an interexchange provider*.") (emphasis added). Consequently, an interconnected VoIP service "provides" telecommunications within the meaning of Section 254(d).[3]

b. Furthermore, there is a basis for the Commission to find that compelling interconnected VoIP providers to contribute to the Federal Universal Service Fund is in the public interest. Interconnected VoIP providers compete directly against other providers of voice services that do contribute to the fund. Consequently, requiring VoIP providers to contribute will advance the principles of competitive neutrality, equity, and nondiscrimination that are ingrained in Section 254 and will assure that the universal service contribution mechanism does not create marketplace distortions.

[3] Section 254(d) differs from CALEA, which expressly limits the application of certain obligations to information services. *See* 47 U.S.C. § 1001(8)(C)(i). Of course, as we have shown elsewhere, in the case of CALEA, the Commission already has correctly concluded that interconnected VoIP services are subject to the requirements imposed by that statute. But whatever arguments VoIP providers may have made under CALEA do not apply here because the absence of such an explicit provision in Section 254(d) – and, indeed, the latter provision's clear authorization to require entities other than telecommunications carriers to contribute – forecloses any argument that the Commission cannot reach VoIP providers under Section 254(d).

2. The Commission Can Employ a Safe Harbor or Proxy Approach to Determine the Percent of VoIP Revenues Subject to Assessment Pending Comprehensive Reform of the Contribution Mechanism.

The current mechanism bases assessments on interstate end user telecommunications revenues. As the Commission has correctly found, VoIP traffic is inherently interstate and cannot reasonably be divided into separate interstate and intrastate components.[4] Nonetheless, the fact that VoIP is interstate as a *jurisdictional* matter does not necessarily compel the Commission to assess one hundred percent of VoIP retail revenues as part of the interim contribution mechanism. Rather, the statute requires that contributions be made on an "equitable and nondiscriminatory" basis, 47 U.S.C. § 254(d), which provides flexibility for the Commission to craft a safe harbor or proxy approach that treats interconnected VoIP providers in an equitable manner compared to other telephone service providers.

In particular, one way to assess VoIP providers on an equitable basis with other providers would be to apply the existing 28.5% of retail revenues safe harbor for wireless carriers to VoIP providers as a safe harbor or proxy as well. Using this figure on an interim basis as a proxy to determine the percentage of retail VoIP revenues that would be assessed is equitable and nondiscriminatory by definition, given that these services would be treated identically.[5] Indeed, there are strong parallels between interconnected VoIP providers and wireless carriers, since both types of entities offer full connectivity to the public switched telephone network as well as

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[4] *See Vonage Holdings Corporation Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 ¶ 14 (2004) ("the characteristics of [interconnected VoIP] preclude any practical identification of, and separation into, interstate and intrastate communications ....").

[5] The Commission adopted a wireless safe harbor in 1998 in light of the difficulty in distinguishing between intrastate and interstate wireless revenues. *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 ¶¶ 20-22 (2002) ("*Contribution Order*").

the capability for mobility.[6] And this approach would treat VoIP equitably compared to other wireline telephone service providers as well, since those providers also contribute on only a percentage of their total telephone service revenues.

Pending further reform of the contribution mechanism, there is no procedural obstacle to requiring VoIP providers to contribute pursuant to a safe harbor or proxy. The Commission has sought broad comment on whether and how VoIP providers should contribute. *See IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶ 64 (2004) ("If the Commission were to exercise its permissive authority over facilities-based and non-facilities-based providers of IP-enabled services, how could it do so in an equitable and nondiscriminatory fashion? ... How would providers of IP-enabled services identify the portion of their IP-enabled service revenues that constitute end-user telecommunications revenues?"). The proxy approach to contributions would constitute a "logical outgrowth" of this inquiry, and thus the Commission has satisfied the APA's notice and comment obligations. *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991).[7]

Because this action would be interim in nature, the Commission would be entitled to substantial deference from the courts. *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984); *see also CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997). This is particularly so where, as here, the interim rules afford the Commission sufficient time to

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[6] The Commission stated that the VoIP service at issue in *Vonage,* which it found to be jurisdictionally interstate, was "*far more similar* to CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues." 19 FCC Rcd 22204 at ¶ 22.

[7] The logical outgrowth test inquires whether a party "'should have anticipated that such a requirement might be imposed.'" *Aeronautical Radio*, 928 F.2d at 446. Here, the Commission has given clear notice that it might require VoIP providers to contribute to the federal universal service fund and has adopted a safe harbor approach for another service that could not readily separate intrastate and interstate revenues. Consequently, VoIP providers reasonably could have anticipated that they, too, might be subject to a safe harbor approach.

"implement comprehensive ... revisions in a manner that would cause the least upheaval in the industry." *MCI Telecommunications Corp.*, 750 F.2d at 141. Specifically, by capturing a portion of VoIP revenues on an interim basis, the Commission can assure that the contribution base remains relatively stable, and federal universal service support remains "sufficient" and "predictable," while it finalizes a longer-term reform plan.

For these reasons, the Commission may require interconnected VoIP providers to contribute to the Federal Universal Service Fund pending comprehensive reform of the contribution mechanism, and it may take such action without first determining whether interconnected VoIP is a telecommunications service or an information service.